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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961

No. [redacted]807

BEN LEWIS, otherwise called BEN ERLICH,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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Opinion of the Court Below

The opinion of the Supreme Court of Illinois is reported at 22 Ill. 2d 68, 174 N.E. 2d 197. (Appendix 1, *infra.*)

Statement of Jurisdiction

The judgment of the Supreme Court of Illinois was entered on March 29, 1961; a timely petition for rehearing was denied on May 17, 1961.

The statutory provision believed to confer jurisdiction to review the judgment in question by writ of certiorari upon this Court is Title 28 United States Code, Section 1257 (3).

Question Presented

Whether the denial of a remedy to a petitioner who was convicted in a criminal case upon perjured testimony deprived him of his liberty without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provision Involved

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The petitioner, Ben Lewis, was convicted by the Criminal Court of Cook County, Illinois, of obtaining money by means of the confidence game and was sentenced to the Illinois State Penitentiary for a term of not less than three nor more than ten years. His conviction was reviewed upon writ of error by the Illinois Supreme Court and affirmed. *People* v. *Lewis*, 17 Ill. 2d 403, 161 N.E. 2d 821. He thereafter filed a petition under Section 72 of the Illinois Civil Practice Act, Ill. Rev. Stat. 1959, ch. 110, par. 72, praying for relief from the judgment and sentence of the Criminal Court of Cook County and for a new trial. The grounds alleged for such relief were that the conviction was obtained by perjured testimony. (Abstract of Record as prepared for use in the Supreme Court of Illinois, p. 2-11; hereafter referred to as Abstract.) The trial court allowed the State's motion to strike and dismissed the petition. The petitioner appealed directly to the Illinois Supreme Court. The Illinois Supreme Court (Appendix 1, *infra*), held that the Illinois Civil Practice Act afforded a remedy, in a proper case, to obtain relief from a judgment based on perjured testimony. The court further held, however, that the petition failed to show that the "petitioner now has some substantial evidence of perjury which he did not have at the time of trial and which, by the exercise of reasonable diligence, could not have been available at the trial," and for this reason the action of the trial court in striking the petition was affirmed. *People* v. *Lewis*, 22 Ill. 2d 68, 174 N.E. 2d 197. The question of the deprivation of a federal constitutional right was preserved in the brief filed by the Petitioner in the Illinois Supreme Court, and the issue was recognized by that Court in its opinion. (Appendix 1, *infra*, p. 7).

Reason for Granting Writ

Unlike *Napue* v. *Illinois*, 360 U.S. 264, this case does not involve a situation wherein it has been alleged that the prosecuting officers had knowledge of the falsity of the testimony. The Illinois Supreme Court has, however, tacitly recognized that a person convicted of a crime upon perjured testimony has a constitutional right to a corrective judicial process whether or not the allegation is made that the falsity of the testimony was within the knowledge of the prosecuting officers. The Illinois Supreme Court has also recognized that the statutory method chosen by the petitioner is a proper method in Illinois for securing the relief sought. In so doing, however, the court has imposed a stringent burden upon the petitioner, which, it is submitted, denies the petitioner due process of law. Because of the impact of a conviction based upon perjured testimony upon the due process clause of the Fourteenth Amendment to the Constitution of the United States, this Court is requested to define the rights of a petitioner claiming to have been convicted by such testimony. In this regard it is contended that, in denying the petitioner herein the opportunity to present evidence as to the alleged perjured testimony, the Illinois Court has denied him due process of law. The basis of this argument is that it is a denial of due process for a state to condition relief upon the issue of whether the fact of perjury was known or unknown to the defendant at the time of trial, and that due process of law requires a corrective judicial process in the event of perjured testimony irrespective of whether or not the fact of perjury was known to the petitioner at the time of trial.

This Court has held, in *Napue* v. *Illinois*, 360 U.S. 264, at page 269, that " * * * a conviction obtained through use of false evidence, known to be such by representatives

of the State, must fall under the Fourteenth Amendment, * * * [citing authorities]. The same result obtains when the State, although not soliciting false evidence, allows it to go uncontested when it appears." And the lower federal courts have interpreted *Mooney* v. *Holohan*, 294 U.S. 103, and succeeding decisions of this Court to mean that:

> " * * * 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired." *Jones* v. *Commonwealth of Kentucky*, 6 Cir. 1938, 97 F. 2d 335, 338.

The effect of the petitioner's knowledge of the perjured nature of the testimony at the time of his trial, or his diligence in attempting to overcome it at that time, as a basis for determining whether or not he is entitled to a "corrective judicial process" pales in comparison to the overwhelming sensation of abhorrence which is engendered by a conviction based upon such testimony. If proper allegations regarding knowledge and diligence are the touchstone to corrective relief, then the constitutional dogma expressed in *Mooney* v. *Holohan*, 294 U.S. 103; *Napue* v. *Illinois*, 360 U.S. 264, and *Jones* v. *Commonwealth of Kentucky*, 6 Cir. 1938, 97 F. 2d 335, fades into insignificance in the light of the adversary system of criminal jurisprudence.

Petitioner's contention that his right to corrective judicial relief is an absolute right founded in the constitution and entitled to consideration of the courts irrespective of knowledge of, or diligence to prevent perjury at the time of trial, is an issue which has not previously been

determined by this Court. This contention is based on the assumption that a conviction based on perjured testimony is counter to our fundamental concepts of ordered liberty and justice; that such a conviction is abhorrent to the constitutional command that no person shall be deprived of liberty without due process of law; and that the petitioner's alleged neglect in allowing the perjury to go unchallenged at the trial cannot, in view of attitudes which have been previously expressed concerning such convictions, operate to bar him from relief which is required by the constitution.

Conclusion

For the above and foregoing reasons, a writ of certiorari should issue from this Court to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,
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Attorney for Petitioner

JASON ERNEST BELLOWS
SHERMAN C. MAGIDSON
On the Brief

APPENDIX I.

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket No. 36099 — Agenda 15 — January, 1961

The People of the State of Illinois, Appellee,
v. *Ben Lewis, otherwise called Ben Erlich, Appellant.*

MR. JUSTICE HERSHEY DELIVERED THE OPINION OF THE COURT:

Petitioner was convicted of obtaining money by means of the confidence game and was sentenced to the penitentiary for a term of not less than three nor more than ten years. His conviction was reviewed by this court on writ of error and was affirmed. *People* v. *Lewis*, 17 Ill. 2d 403. Thereafter he filed a petition under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1959, chap. 110, par. 72), praying that judgment and sentence be vacated on the ground that his conviction was obtained by perjured testimony. The trial court allowed the State's motion to strike and dismissed the petition. Petitioner appeals directly to this court, on the ground that this is considered a criminal case above the grade of misdemeanor. *People* v. *Quidd*, 409 Ill. 137.

Petitioner contends that the constitutional guarantee of due process requires that there be an available remedy for securing relief from a conviction based upon perjured testimony, and that section 72 of the Civil Practice Act, as amended in 1955, is sufficiently broad to afford such a remedy. The State contends that section 72 may not be used to set aside a judgment allegedly based on perjured testimony, and that, in any event, petitioner is not entitled to the relief prayed for because he does not allege that the prosecuting officers had knowledge of the falsity of the testimony, and for the further reason that petitioner

knew or should have known at the time of trial of the facts now alleged as a basis for relief.

Considerable confusion exists among American cases as to the availability of relief from a judgment based on perjured testimony. (See Annotation: "Perjury as grounds for attack on judgment or order of court," 126 A.L.R. 390.) Statements denying in sweeping terms the availability of relief appear to have stemmed from the broad dictum in *United States* v. *Throckmorton*, 98 U.S. 61, 25 L. Ed. 93, which was based on reasons which are far from satisfying and which has not been followed by the United States Supreme Court. *Cf. Marshall* v. *Holmes*, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. The dictum of the *Throckmorton* case does not appear to have been followed in Illinois, and there are at least two early decisions of this court holding that, under proper circumstances, a bill in equity would lie to obtain relief from a judgment based upon perjured testimony. *Seward* v. *Cease*, 50 Ill. 228; *McGehee* v. *Gold*, 68 Ill. 275. In our opinion, therefore, section 72 affords a remedy, in a proper case, to obtain relief from a judgment based on perjured testimony.

It does not, however, follow that mere allegations of perjury are sufficient to sustain a petition under section 72. In order to be entitled to relief, petitioner must not only show that adequate grounds for relief exist but also that it was through no fault or neglect of his own that the grounds now claimed for relief were not previously made to appear to the trial court. *Brockmeier* v. *Duncan*, 18 Ill. 2d 502, 165 N.E. 2d 294; see *Ephraim* v. *People*, 13 Ill. 2d 456, 150 N.E. 2d 152; *Glenn* v. *People*, 9 Ill. 2d 335, 137 N.E. 2d 336; *People* v. *Oaban*, 368 Ill. 173, 13 N.E. 2d 162. In *Brockmeier* v. *Duncan*, 18 Ill. 2d 502, 505, 165 N.E. 2d 294, 296, in considering a petition under section 72, we said: "Assuming that the present

petition alleges facts which would otherwise justify the granting of relief, the absence of any excuse for not asserting them in apt time must preclude it. The rule is well established that a person may not avail himself of the present remedy unless he shows that through no fault or negligence of his own, the error of fact or the existence of a valid defense was not made to appear to the trial court. (*Guth* v. *People*, 402 Ill. 286, 83 N.E. 2d 590; *Greene* v. *People*, 402 Ill. 224, 83 N.E. 2d 582.) Such a motion or petition is not intended to relieve a party from the consequences of his own mistake or negligence. *McCord* v. *Briggs & Turivas*, 338 Ill. 158, 170 N.E. 320; *Cramer* v. *Illinois Commercial Men's Ass'n.*, 260 Ill. 516, 103 N.E. 459."

None of the numerous cases cited by petitioner suggests any different rule. In the opinion in *Shammas* v. *Shammas*, 9 N.J. 321, at page 330, 88 A. 2d 204, at page 208, a case most heavily relied upon by defendant, the New Jersey court, speaking through Mr. Justice Brennan, said: "Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. *Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is in all the circumstances not a bar to relief.*" (Emphasis supplied.)

Neither of the two early Illinois cases heretofore cited is at variance with these principles. In *McGehee* v. *Gold*, 68 Ill. 215 the perjury was unknown to complainant at the

time of trial and the allegations of the complaint clearly showed due diligence on his part. In *Seward* v. *Cease*, 50 Ill. 228, while the fact of perjury was presumably known at the time of trial to the person seeking relief, he had done everything possible at that time to combat it, and the means by which he could effectively prove the perjury were not available until later.

Judged by these standards the petition in this case falls far short of stating grounds showing that petitioner is entitled to the relief prayed for. The petition makes wholesale charges in which no fewer than eight witnesses are charged either with perjury or with failure to make known to the court certain facts. The petition as filed contained nothing to indicate that the matters relied upon for relief were not known to the petitioner at the time of trial. Thereafter the petition was amended to include an allegation to the effect that petitioner was not able to learn or discover the perjurious testimony until after he was convicted and the case was in this court for review. This allegation was not verified by the petitioner, and in any event is contradicted by the petition itself, which shows on its face that in many instances the alleged perjury was known to the petitioner at the time of trial. In other instances, the perjury complained of was of such a nature that it must necessarily have been known to him at the trial. Counsel for petitioner has acknowledged this in his reply brief and on oral argument, but he argues that petitioner may have been unable to prove the falsity of the testimony at the time because he could not have been expected to have anticipated perjury. The petition, however, contains no showing that petitioner now has available any evidence to prove the perjury that was not available or which could not by the exercise of reasonable diligence have been produced at the trial. Virtually the only men-

tion in the petition of the evidence by which petitioner proposes to prove that perjury was committed is a letter to him from an attorney for one of the witnesses. This letter was dated approximately two and one-half years before the trial and was presumably in petitioner's possession that whole time, yet no explanation is offered for the failure to produce it at the trial. While it would be unfair to require the petition to detail all the evidence by which petitioner proposes to prove the falsity of the allegedly perjured testimony, it must at least show that petitioner now has some substantial evidence of perjury which he did not have at the time of trial and which, by the exercise of reasonable diligence, could not have been available at the trial. This the petition has wholly failed to do.

The judgment of the criminal court of Cook County is, therefore, affirmed.

Judgment affirmed.

APPENDIX II.

JUDGMENT ORDER OF THE SUPREME COURT OF THE STATE OF ILLINOIS

Be it remembered, that, to-wit: on the 29th day of March, 1961, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People of The State of Illinois, *Appellee*
No. 36099 vs.
Ben Erlich, *Appellant*

Appeal from Criminal Court of Cook County
57-470

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in the record there is no error.

Therefore, it is considered by the Court that the judgment of the Criminal Court of Cook County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.